

TESTIMONY

of

GARY PARSONS  
CHAIRMAN OF THE BOARD OF DIRECTORS  
XM SATELLITE RADIO INC.

On

DIGITAL CONTENT AND ENABLING TECHNOLOGY:  
SATISFYING THE 21<sup>st</sup> CENTURY CONSUMER

BEFORE THE SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER  
PROTECTION

COMMITTEE ON ENERGY AND COMMERCE  
U.S. HOUSE OF REPRESENTATIVES

May 3, 2006

Mr. Chairman and Members of the Subcommittee, I am pleased to appear on behalf of our 800 employees, who have made XM Satellite Radio America's most popular satellite radio company. Thank you for inviting XM to speak on behalf of the satellite radio industry and our customers, and more broadly in support of consumers' right to enjoy radio content for their own personal use. Like the Members of this Subcommittee who long have promoted fair use, we believe it is possible to both support consumers' personal rights to time-shift and record from broadcasts, and protect the interests of content owners.

As we look to the future, we hope to help grow the music industry by enhancing the discovery of music by our six and a half million subscribers and an estimated thirteen to fifteen million XM listeners across the country. We're very excited about our potential at XM, but we still are an industry in its infancy. We will only succeed by keeping our existing subscribers and attracting lots of new ones. And we can only do that through constant innovation to improve listeners' experience.

Today, XM subscribers can expect to pay approximately \$120 per year to listen to over 170 channels of entertainment, sports, news, talk, and other programs, including 69 channels of commercial-free music programming. Until recently, most of our subscribers heard their favorite programs only at home or in their cars and trucks. To add to their enjoyment, we first developed a hand-held device that could receive XM live and store up to five hours of programming. In response to growing consumer demand, we are bringing new portable personal products to market that, for the first time, will give our

subscribers the ability to receive live XM satellite radio, “time-shift” XM programming for later listening, and listen to their own MP3 music collection, all in a single, convenient handheld device. These new generation portable radios will allow subscribers to store up to 50 hours of XM programming, to enjoy their music on the go, and to purchase additional music tracks--even entire albums--with ease from the new Napster online music service.

Our research shows that XM subscribers buy more music, and over time buy a broader range of music and attend more concerts, than other music consumers. Despite this fact, the recording industry wants to stop these new products from coming to market, that is, unless we let them take control of designing the features we build into the devices. As a result, we have been threatened with litigation and now face the prospect of device-crippling legislation in this and other Congressional Committees.

### *About XM*

XM is one of the great American high-tech success stories of this decade. Using spectrum purchased at auction for nearly \$90 million, we launched our subscription service late in 2001. Since then, we have invested nearly \$3 billion in building a state-of-the-art network for the delivery of radio programming. Despite the challenges of launching a business in an economic recession and at the height of the dot.com bust, XM has grown into an enormously popular consumer business. And we hope for it to be a cash-positive business soon as well.

We built our entire business in compliance with the law, particularly the Audio Home Recording Act and the Digital Millennium Copyright Act of 1998. As a result, the record industry gets paid twice for the music our subscribers enjoy; once through the royalties we pay under Section 114 of the Copyright Act of 1998, and a second time when our device manufacturers pay royalties under the Audio Home Recording Act.

We continue to make huge investments not only in technology, but also in gifted individuals. We employ rocket scientists, electrical and broadcast engineers, consumer electronics wizards, athletes, a public radio legend, traffic reporters, marketing experts, and some of the world’s foremost music experts. Unfortunately, we also have been forced to employ more and more lawyers.

### *Relationship to the Music Industry*

Since the launch of our service, XM and the music industry have enjoyed a symbiotic relationship. Without compelling content, our multi-billion dollar, state-of-the-art delivery system would not have attracted more than six and a half million subscribers. Nor would the music and recording industries, and songwriters and performers have received tens of millions of dollars in royalties from us. Having made that investment, we are now delivering a wide diversity of music to millions of enthusiastic, paying music fans. We have demonstrated that you can build a business that promotes the interests of both consumers and the music industry.

As an industry, satellite radio is the single largest contributor of sound recording performance royalties to artists and record labels. In fact, XM and Sirius pay more in such performance royalties than all other digital broadcasters and webcasters combined. Likewise, XM and Sirius pay huge royalties to composers and publishers. We respect, appreciate, and *compensate* creators of music. In short, through the investment of enormous amounts of risk capital, we have created a new source of royalty payments for rights holders.

In addition to these new royalty payments, we continue to provide the music industry with a powerful promotional platform. Airplay has long been an essential promotional tool for music. In fact, Congress exempted traditional radio from paying sound recording performance royalties precisely because it recognized its promotional value. XM provides the same if not greater promotional value to artists and labels, and yet we do not enjoy this same exemption. Even for HD digital radio, terrestrial broadcasters are exempt from the sound recording performance royalty obligations that XM pays. In fact, as you know, recent payola allegations suggest that record labels (that *collect* money from satellite radio) actually *pay* traditional radio stations to play their music. Despite this disparate treatment, we are not here today to ask you to change current law, but instead to help you understand the competitive environment in which we operate.

Over the past two decades, playlists at traditional radio stations have been shrinking, forcing the public to endure an endless repetition of the same handful of songs. The variety of formats has declined as well. By contrast, XM offers our subscribers 69 channels of commercial-free music. We have over two million titles in our collection, and play approximately 160,000 different tracks each month.

We have something for everyone: 24-hours per day of bluegrass, blues, classical, country, hip hop, jazz, opera, pop, and rock and roll. We have channels devoted to emerging artists. We have a channel for artists that as yet are unsigned to any major record label. Our “Deep Tracks” channel has helped to reinvigorate the careers of many rock stars of the 1960s and ‘70s, and we have provided the opportunity for bands to perform live in the “XM Café” at our recording studios. XM presents a series called “Artist Confidential” and music shows hosted by stars as diverse as Bob Dylan, Quincy Jones, Tom Petty, Wynton Marsalis, and Snoop Dogg to help our listeners understand more about music from the artists’ perspective. Our channel 73, “Frank’s Place,” features the greatest singers of American Popular Song, from its namesake Frank Sinatra to greats such as Ella Fitzgerald, Sarah Vaughan, Tony Bennett, and Rosemary Clooney.

At the touch of a button, XM listeners see the name of the performing artist and the name of the song they are hearing. Unlike broadcast radio stations, which rarely announce what they play, XM is a powerful tool for educating consumers hungry to discover and buy more music. In so doing, we provide promotional value and royalty compensation never offered to the record industry by traditional radio. And yet the music industry continually attacks us for bringing great new products to market.

## *New Devices*

From the outset, we have been committed to offering consumers the best and most innovative products, while respecting copyright. Our subscribers want more than just the ability to hear great music at home or on the highway. Last year, we introduced a line of products called XM2GO. These portable products allow consumers to listen to XM live or to record up to five hours of programming, and thus to enjoy XM even when they cannot receive a satellite signal, such as at the gym or on an airplane flight.

We are building on the success and the functionality of the XM2GO devices with the Pioneer Inno and the Samsung Helix. Like the XM2GO, these new personal portable devices enable consumers to listen to live XM or to record content they receive over satellite radio. A subscriber can program these devices, like “time-shifting” on a VCR or TiVo, to record a program that they cannot listen to live. Just as you can time-shift the television broadcast of a baseball game for later viewing on your VCR or TiVo, you can use these new XM portable devices to time-shift the radio broadcast of the game from XM. The devices also will offer the type of functionality consumers have come to expect from their everyday personal portable music devices. The XM Helix and Inno players give consumers the ability to organize the content they have recorded so they can listen to that content in any order they choose. In addition, the new devices include the ability for consumers to store songs from their personal music collection, as they can do with any MP3 player, and to mix those songs with new music they hear on satellite radio. And if they enjoy a song they have heard or recorded, they can “bookmark” a song to buy it later on CD, or, they can connect to their computer and purchase the song lawfully online from the new Napster and have it downloaded directly to the device.

As a responsible business, we specifically designed our products to comply with the Audio Home Recording Act (AHRA). When it adopted the AHRA in 1992, Congress created the legal framework for companies like XM to manufacture and distribute devices that can record digital music. As you will recall, that legislation allows consumers to digitally record music from CDs and broadcast transmissions for personal use, but prevents making digital copies from copies. In addition, under the AHRA manufacturers pay royalties on the sale of devices. The millions in revenues paid by manufacturers are shared with everyone in the music industry, under a formula enacted by Congress with the support of all music industry stakeholders. In return, manufacturers, distributors, retailers, and consumers are immune from lawsuits based on copyright infringement. This represented a balanced compromise that won unqualified support from the recording industry, the music industry, and the consumer electronics industry.

Congress intended the AHRA as a comprehensive and forward-looking compromise solution for the recording industry’s concerns, for all new digital recording devices.

And so did the recording industry. Then-RIAA president Jay Berman testified before Congress that the AHRA “will eliminate the legal uncertainty about home audio

taping that has clouded the marketplace,” and “will allow consumer electronics manufacturers to introduce new audio technology into the market without fear of infringement lawsuits... .” In supporting the passage of the AHRA, Mr. Berman assured Congress that they would not have to revisit the home recording controversy for every new generation of digital recorder, proclaiming that the AHRA “is a generic solution that applies across the board to all forms of digital audio recording technology. Congress will not be in the position after enactment of this bill of having to enact subsequent bills to provide protection for new forms of digital audio recording technologies.”

Similarly, on behalf of the songwriting and music publishing community, then-president of the National Music Publishers Association, Edward P. Murphy, testified before Congress in support of the AHRA, “[Our] enthusiastic support for the Audio Home Recording Act ... stems from its comprehensive approach to audio home taping issues. The proposed legislation incorporates the critical royalty component, and it extends to all digital audio recording technologies, not just to DAT.”

In reliance on the AHRA, XM has invested in the design and manufacture of our new generation personal portable radio products. In compliance with the AHRA, these new generation devices do not allow any of the recorded content to be moved off the device in digital form. Content saved to the device from XM *stays* on the device, and cannot be copied or moved. The only output on these devices goes to your headphones, in analog form. The new Helix and Inno products promote personal listening enjoyment, not Internet piracy.

Despite our payment of millions of dollars in performance royalties and millions more in AHRA royalties, and the limitations we designed into the devices so that XM content will not be uploaded to the Internet, XM still faces opposition from the music industry. We have heard it said that allowing consumers to record satellite radio turns our radio service into an unlawful download business. We disagree. We have heard it said that we are now giving consumers for the first time the ability “to slice and dice” music as they see fit. We disagree. And we have been told our devices will cannibalize the sale of recorded music, rather than promote sales as XM has done since its inception. We emphatically disagree.

As an initial matter, we strongly reject the music industry’s efforts to roll back the long-established ability of consumers to record off the radio for personal use. We are particularly disappointed that the head of the RIAA has sought to vilify our law-abiding customers in testimony before the House Judiciary Committee, when he accused home tapers using new technology of “boldly engag[ing] in piracy with little fear of prosecution.” XM listeners are avid music fans and some of the music industry’s best customers, not pirates. And XM, and the consumer electronics manufacturers which build our new products in compliance with the AHRA, are not pirates either.

Recording content off satellite radio is not the same as downloading music and has nothing to do with piracy:

- ❖ When a consumer wishes to download a song from the new Napster or iTunes, he can acquire that specific song on-demand within seconds of entering the name of the song. By contrast, XM subscribers have no ability to choose what XM plays or, therefore, what songs they can record. XM decides what is played.
- ❖ When a consumer buys a download from an Internet service, she can typically copy the song onto multiple devices and even burn it on to CDs. If a subscriber records a song from XM, the song is output only to her headphones. It cannot be burned directly to a CD, moved to any other device, or uploaded to the Internet.
- ❖ When a consumer purchases a download, he gets the full song from beginning to end. When a subscriber records a song off of XM, the recording is no substitute for the original. Just like recordings made using a tape recorder from FM radio, songs recorded off XM include DJ talk, overlapping parts of the preceding and following songs, and they may even have a few seconds cut off.
- ❖ A download service, unlike XM, knows exactly what the consumer is downloading and can charge for every download. XM, like any radio service, has no way to know how many subscribers are listening at any given time, no less whether or what any subscriber may be recording. That is precisely why Congress created a royalty payment pool under the AHRA of funds to be shared among the music industry, based on general digital recording for personal use.

In short, we are providing our subscribers greater value from their XM subscription: the ability to take XM with them everywhere, on the go in their busy lives.

These new personal portable XM devices are merely today's equivalent of recording off the radio, with the flexibility consumers have come to expect from new digital technology. We are giving our subscribers the tools to enjoy music they have lawfully acquired, with the capability to listen to that music in any order they want, to skip over songs they don't like, and to put together lists of songs for listening when jogging, commuting, or shopping – including when shopping for CDs. When a consumer records television programming on a TiVo, he or she can search for a particular episode and disaggregate it from the other recorded content. Like TiVo, we give consumers the tools to maximize their personal, non-commercial listening experience. But unlike TiVo, we cannot offer a program guide to tell our subscribers what songs are coming or when to record – because the law prohibits us from doing so.

As in the days of reel-to-reel tape and later with analog cassettes, consumers can record from XM programming and decide when and in what order to listen to it. No doubt a few of you remember the experience of recording a song off the radio, using a razor blade to cut the tape, and with the help of Scotch® tape re-arranging the songs to make a party list of favorites. Our devices, like many other lawful products on the market

today, simply update the tools for personal recording of radio into the 21<sup>st</sup> century. Had Congress heeded the objections of the content industry to each new technological innovation, consumers never would have had the right to enjoy the analog cassette recorder, the VCR, the CD Recorder, the MP3 player, the TiVo, the Slingbox – or, now, XM’s new generation portable satellite radios. Our new devices offer our subscribers the convenience of digital recording technology that they get from every other new digital media device they own. But just because a device makes personal recording convenient does not, and should not, make it illegal.

### *Conclusion*

Today, XM offers more than six and a half million subscribers and thirteen to fifteen million listeners the ability to enjoy music wherever they go. We are doing so lawfully, pursuant to the statutory framework Congress established in 1992 and 1998. We are doing so in a way that delivers tens of millions of dollars in new royalty payments to the music industry and millions more in additional royalty payments under the AHRA. And we are doing so in a way that facilitates the purchase of music and thus gives the music industry another way to compete against illegal P2P networks.

In short, we are doing it right. We are following the laws that Congress designed to apply to XM and to our new generation portable personal products. Like the companies behind every new technology from the transistor radio to the iPod, XM Satellite Radio is giving consumers new lawful ways to take their music wherever they go. We provide compensation to songwriters and music publishers both through performance rights and the AHRA. And, in addition to the AHRA payments on our devices, satellite radio pays more performance rights royalties to sound recording copyright owners and performing artists than any other industry.

Thank you for your consideration of our views and thank you again for standing up for the rights of innovators to bring new products to market and consumers to exercise their fair use rights.